Office - Supreme Court, U.S.
FILED
OCT 26 1982
ALEXANDER L. STEVAS

No. 82-289

In the Supreme Court of the United States

OCTOBER TERM, 1982

GARY AVANT GREEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a third-party occupant's consent to the search of petitioner's farmhouse was voluntary.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-6) is reported at 678 F.2d 81. The district court did not issue a written opinion.

JURISDICTION

The judgment of the court of appeals was entered on May 20, 1982. On July 20, 1982, Justice Blackmun extended the time within which to file a petition for a writ of certiorari to and including August 18, 1982, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Arkansas, petitioner was convicted on one count of possessing cocaine with intent to

distribute, in violation of 21 U.S.C. 841(a), and one count of conspiring to commit that offense, in violation of 21 U.S.C. 846. He was sentenced to concurrent five-year terms of imprisonment on each count, to be followed by a special parole term of three years (Pet. App. A-2 to A-3). The court of appeals affirmed (*id.* at A-6).

1. The evidence at trial showed that Jorge Alvarez obtained cocaine from petitioner's co-defendant Jose Chavez in Miami, Florida, and sold the cocaine to customers provided by petitioner. Petitioner permitted Alvarez to stay in petitioner's farmhouse and to use the farmhouse to distribute cocaine. As compensation for providing Alvarez with customers, petitioner received $100 on the sale of each ounce of cocaine (Pet. App. A-4).

On October 6, 1980, John Healey, an informant, introduced Alvarez to Mike Lowery, an undercover agent posing as a customer. Lowery purchased two ounces of cocaine from Alvarez for $4,200. During the early morning hours of October 7, Lowery attempted to purchase additional cocaine from Alvarez. In the course of these negotiations, Alvarez invited into the farmhouse an undercover agent, Mike Hurley, who was posing as Lowery's associate. Instead of making the purchase, Hurley and other law enforcement agents arrested Alvarez, who subsequently consented to a search of the farmhouse (Pet. App. A-4). Alvarez led the agents to a mattress under which he had placed the money he had received from Lowery in the previous cocaine sale. He also showed the agents a vacuum cleaner in which he had hidden some cocaine and stated that he had placed additional cocaine behind a board in the bathroom wall. The agents retrieved the cocaine from these locations (*id.* at A-4 to A-5).

2. Prior to trial, petitioner moved to suppress the evidence seized from his farmhouse on the ground that the law enforcement agents had coerced Alvarez' consent to search.

The government's primary witnesses at the suppression hearing were Alvarez and Agent Hurley. Alvarez testified that after he was arrested and handcuffed Hurley told him that it would be better for him if he cooperated with the agents by showing them where the cocaine was concealed (S.H. 36, 66, 169).[1] According to Alvarez, Hurley told him that if he did not consent to the search, the agents would obtain a search warrant that would authorize them to "tear up" the farmhouse (*id.* at 63-64) and that they would bring charges against Alvarez' girlfriend (*id.* at 40, 169), who was present in the farmhouse at the time of the arrest (*id.* at 63). Alvarez testified that he thereafter signed a consent form (*id.* at 38) and led the agents to the cocaine (*id.* at 37, 38-40). He also testified that the agents had given him the choice whether or not to sign the form and that his head had been clear at the time he signed it (*id.* at 37, 69, 73, 74).

Agent Hurley testified that after arresting Alvarez and advising him of his constitutional rights he told Alvarez that if he would agree to cooperate and show the agents where the cocaine and money were hidden, the agents would recommend to the United States Attorney that he be charged with only one count, even though he could be charged with three or four (S.H. 115, 125). Hurley expressly denied that he had threatened to arrest Alvarez' girlfriend if Alvarez did not cooperate (*id.* at 125, 126). Indeed, he testified that he made it clear to Alvarez from the beginning that "as an expression of our good faith" the agents would not charge his girlfriend (*id.* at 126).

The district court denied petitioner's motion to suppress. The court concluded that "the officers [did not] actually threaten[] to tear down the [farmhouse]," but rather "told

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[1] "S.H." refers to the transcript of the pre-trial suppression hearing, held on January 20-21, 1981. "Tr." refers to the transcript of the hearing on the motion for a new trial.

[Alvarez] they could get a search warrant and that search warrant would authorize them to tear down the place to find what was there that was being legitimately searched for" (S.H. 194). Although the court credited Alvarez' testimony that Agent Hurley said he would prosecute Alvarez' girlfriend if Alvarez did not cooperate (*id.* at 197), the court found that the agents did not go "beyond telling [Alvarez] what the law would permit them to do" and held that that is "a factor that law officers should be able to put into the equation and a person be able to make a judgment as to whether he wants to consent or not" (*id.* at 194).

3. Eight months after his conviction, while his appeal was pending, petitioner moved for a new trial under Fed. R. Crim P. 33 based on newly discovered evidence. At the hearing on the motion John Healey, who had been the government's informant, and Bobby Woodward, a Pulaski County Sheriff's Office Deputy who was present at the scene of Alvarez' arrest, testified that Officer Sam Williams of the Little Rock Police Department had told Alvarez that he would receive a 20-year prison sentence and would be deported if he did not show the agents where the cocaine was located (Pet. App. A-5 n.4; Tr. 18, 48). On rebuttal, Officer Williams testified that he made no such threats (Tr. at 269).

The district court denied petitioner's motion for a new trial (Pet. App. A-5 n. 4). It held that Woodward's testimony could not provide the basis for a new trial because Woodward had been available to testify at the pre-trial hearing (Tr. 300). The court found that Healey's testimony was motivated by his belief that Agent Hurley had been responsible for Healey's having lost his position with the Pulaski County Sheriff's Office (*id.* at 304). The court also stated that it did not believe Woodward's and Healey's

testimony about the alleged threats (*id.* at 303, 306), but that in any event statements about what authorities could do within the law were not improper (*id.* at 303).

4. The court of appeals affirmed (Pet. App. A-1 to A-6). It observed that the findings of the district court were based on credibility determinations and concluded that substantial evidence supported the district court's finding that Alvarez had voluntarily consented to the search and seizure of the evidence (*id.* at A-6).

ARGUMENT

The petition raises matters properly entrusted to the discretion of the trial court. The fact-bound question whether Alvarez voluntarily consented to the search of petitioner's farmhouse was resolved against petitioner by both courts below and warrants no further review by this Court.

1. It is unclear whether petitioner challenges the findings of underlying fact made by the district court or whether he contends that as a matter of law the underlying facts found by the court could not support a finding of voluntariness. Either claim is without merit. As this Court held in a case also involving consent to search, "[v]oluntariness is a question of fact to be determined from all the circumstances." *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 248-249 (1973). A district court's finding regarding the voluntariness of a consent to search should not be overturned unless it is clearly erroneous. See, *e.g.*, *United States* v. *White*, 617 F.2d 1131, 1134 (5th Cir. 1980); *United States* v. *Race*, 529 F.2d 12, 15 (1st Cir. 1976). This is particularly so in cases such as the present one in which the district court's conclusion depends on an assessment of credibility. See, *e.g.*, *United States* v. *Weeks*, 645 F.2d 658, 659-660 (8th Cir. 1981). The court here heard extensive testimony from those who were present at the farmhouse when Alvarez consented to the search, including Alvarez himself, and it made specific and careful

findings based on an assessment of the credibility of the various witnesses and consideration of all the circumstances. The court of appeals correctly concluded that there was no reason to question the district court's credibility determinations and that the court's findings were supported by substantial evidence and were not clearly erroneous.

2. Petitioner's principal argument (Pet. 5-6) is that Alvarez' consent could not be voluntary because agents told Alvarez that if he did not consent to the search they would obtain a warrant that would authorize them to "tear up" the farmhouse. This statement by the agents did not render the consent involuntary. The district court found (S.H. 158-159, 194) that the agents did not actually threaten to "tear up" the house, but merely explained to Alvarez that they could obtain a search warrant that would authorize them to do so if that were necessary to find the cocaine. Petitioner does not suggest that there was any element of deception in the statement of the agents. In fact, there clearly was probable cause to support issuance of a warrant based on the fact that agents had purchased cocaine at the farmhouse the day before and that they were in the process of making an additional purchase at the time of Alvarez' arrest. Numerous courts have held that a statement by law enforcement officers that they will obtain a search warrant if consent is not given does not operate to render consent involuntary if a search warrant could in fact have been obtained. See, *e.g.*, *United States* v. *Lace*, 669 F.2d 46, 52-53 (2d Cir. 1982); *United States* v. *White*, *supra*, 617 F.2d at 1134; *United States* v. *Miller*, 589 F.2d 1117, 1132 n.13 (1st Cir. 1978), cert. denied, 440 U.S. 958 (1979); *United States* v. *Agosto*, 502 F.2d 612, 614 (9th Cir. 1974); *United States* v. *Culp*, 472

F.2d 459, 461 n.1 (8th Cir.), cert. denied, 411 U.S. 970 (1973), and cases cited therein.[2]

3. Petitioner also contends (Pet. 6) that Alvarez' consent was involuntary because the agents allegedly told Alvarez he would be deported and would receive a 20-year prison sentence if he did not consent to the search and allegedly threatened the safety of his girlfriend.[3] The allegations about statements concerning deportation and a prison sentence were made by John Healey and Officer Woodward for the first time during the hearing on petitioner's motion for a new trial eight months after his conviction. The district

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[2]Neither *United States* v. *Molt*, 589 F.2d 1247 (3d Cir. 1978), nor *United States* v. *Kampbell*, 574 F.2d 962 (8th Cir. 1978), supports petitioner's argument. In both *Molt* and *Kampbell*, unlike this case, the district court had found on the basis of all the circumstances that consent was not given voluntarily. In *Molt* the district court found that agents had misrepresented the scope of their authority to search, and the court of appeals upheld that conclusion. 589 F.2d at 1250. No such misrepresentation occurred in this case. In *Kampbell* the district court determined that an agent's statement that he could obtain a warrant that would authorize him to " 'tear the paneling off the walls,' " taken with all other circumstances, implied that the agents in fact intended to " 'tear the place apart.' " 574 F.2d at 963. The court of appeals affirmed, citing "the trial judge's superior opportunity to assess the credibility of the witnesses * * *" (*id.* at 964). Here the court of appeals correctly observed (Pet. App. A-6 n.5) that although the district court "reached a conclusion contrary to that reached in *Kampbell*, the decision rests on supportable credibility determinations * * *."

[3]Petitioner also notes (Pet. 6) that Alvarez had been using cocaine prior to his arrest. The district court inquired carefully into this point and heard testimony from Alvarez and others concerning the effect of the cocaine on Alvarez' state of mind (*e.g.*, S.H. 134-135, 167-172, 175-179, 182-186, 190-191). The court concluded that Alvarez "was rational and was perceptive and was aware of what was going on" and that "he was rationally dealing with the situation as he was confronted with it and making choices that he felt to be in his best interest and in the best interest of his girlfriend" (*id.* at 192).

Petitioner also refers to the fact that Alvarez was under arrest at the time he consented to the search, but apparently does not contend that

court not only found that this "evidence" was in part not newly discovered, but it expressly discredited the allegations (Tr. 303, 306).

In addition, there is nothing in the record to suggest that the agents threatened the safety of Alvarez' girlfriend. Alvarez testified (S.H. 40, 169) that Agent Hurley told him that his girlfriend would be charged if he did not cooperate with them. However, the district court found that the agents did not go "beyond telling [Alvarez] what the law would permit them to do" (*id.* at 194) and that the agents were in effect negotiating with Alvarez for his cooperation (*id.* at 159-160).[4] Such negotiations did not render Alvarez' consent to search involuntary. See, *e.g.*, *United States* v. *Culp*, *supra*, 472 F.2d at 462 (consent to search not involuntary when obtained in exchange for a promise by police to "go easy" on defendant's wife); *United States* v. *Race*, *supra*, 529 F.2d at 15 (hour-long negotiation with prosecutor did not render consent to search involuntary). See also *United States* v. *Weeks*, *supra*, 645 F.2d at 659.[5]

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this fact rendered the consent involuntary. See *United States* v. *Watson*, 423 U.S. 411, 424 (1976) (fact of custody alone has never been enough in itself to demonstrate a coerced consent to search).

[4]Petitioner does not contend that the agents lacked probable cause to arrest Alvarez' girlfriend.

[5]Courts also have held that promises of leniency for a family member will not render a guilty plea involuntary. See, *e.g.*, *United States* v. *Turst*, 576 F.2d 396, 397-398 (1st Cir. 1978); *United States* v. *Bartoli*, 572 F.2d 188, 189 (8th Cir.), cert. denied, 438 U.S. 905 (1978); *United States* v. *Carlino*, 400 F.2d 56, 58 (2d Cir. 1968), cert. denied, 394 U.S. 1013 (1969).

Even if Alvarez' consent had been involuntary, admission of the evidence obtained from the search would have been harmless error. The money and cocaine discovered in the course of the search were cumulative to the other evidence at trial, including the testimony of Alvarez and Healey concerning petitioner's role in the cocaine sales.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1982

DOJ-1982-10